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No. 85-1197

In the Supreme Court of the United States

OCTOBER TERM, 1985

HARRY EUGENE CLAIBORNE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an active federal judge must be impeached before he can be indicted and prosecuted for federal crimes.

2. Whether petitioner was the victim of selective prosecution or grand jury abuse.

3. Whether the court of appeals properly held that neither the Jencks Act, 18 U.S.C. 3500, nor the principles of *Brady* v. *Maryland*, 373 U.S. 83 (1963), and its progeny, governing disclosure of materials or information in the possession of the government, entitled petitioner to reversal of his conviction.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A85) is reported at 765 F.2d 784. An earlier decision of the court of appeals in this case (Pet. App. A86-A124) is reported at 727 F.2d 842.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 1985. A petition for rehearing was denied on December 10, 1985 (Pet. App. A125-A126). The petition for a writ of certiorari was filed on January 15, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On December 8, 1983, a seven-count indictment (Pet. App. A137-A148) was returned against petitioner in the United States District Court for the District of Nevada.

Count One of the indictment charged that petitioner, a United States District Judge for the District of Nevada, solicited and received a bribe from Joseph Conforte, a Nevada brothel owner, in return for favorable disposition of motions in a pending case, in violation of 18 U.S.C. 201(c). Count Two charged that petitioner caused an interstate telephone conversation to be made in furtherance of a scheme to defraud Conforte, in violation of 18 U.S.C. 1343. The scheme to defraud allegedly involved petitioner's false representation that he could secure the reversal of the criminal convictions of Joseph and Sally Conforte by bribing one or more judges of the United States Court of Appeals for the Ninth Circuit in return for $100,000 ($55,000 of which Conforte allegedly paid). Pet. App. A87-A88, A138-142. Count Three charged that petitioner obstructed the administration of justice by urging a witness to give false testimony before a federal grand jury investigating petitioner, in violation of 18 U.S.C. 1503. Counts Four through Six charged petitioner with failing to report all of his income on his 1978, 1979, and 1980 tax returns, in violation of 26 U.S.C. 7206(1). Count Seven charged that petitioner knowingly failed to include an outstanding $75,000 loan on the financial disclosure form he filed with the Judicial Ethics Committee, in violation of 18 U.S.C. 1001. Pet. App. A88 n.1.

Petitioner moved to quash the indictment and to dismiss the proceedings against him, asserting that the Constitution prohibits the criminal prosecution of an active federal judge unless he is first removed from office through impeachment (Pet. App. A149-A175). After the district court denied the motion (*id.* at A176), petitioner filed an interlocutory appeal. The court of appeals affirmed (*id.* at A86-A124). The court found that it had jurisdiction to hear an interlocutory appeal on petitioner's claim that a criminal proceeding could not be brought without a prior impeachment (*id.* at

A90-A93) and concluded on the merits that the district court properly denied the motion to quash the indictment (*id.* at A94-A114). This Court denied a petition for a writ of certiorari. No. 83-1992 (Oct. 1, 1984).

Petitioner's first trial, in April 1984, ended in a mistrial when the jury was unable to reach a verdict (Pet. App. A5). On July 5, 1984, the district court, on the government's motion, dismissed Counts One through Four of the indictment (*id.* at A5-A6). Following his retrial, petitioner was convicted on the two remaining tax counts (Counts Five and Six) and acquitted on Count Seven (*id.* at A1-A2, A6). He was sentenced to concurrent terms of two years' imprisonment and was fined $10,000 (*id.* at A2). The court of appeals affirmed (*id.* at A1-A85).[1]

2. The evidence at trial established the following facts. Petitioner opened a law office in Las Vegas, Nevada, in the late 1940's (Tr. 820-821). By the mid-1970's, petitioner had built up a highly successful practice, earning gross income of $375,752 in 1977 and $240,876 in the first eight months of 1978 (Tr. 926-927). On September 1, 1978, petitioner became a federal district judge, earning an annual gross salary of approximately $54,000 (Tr. 856, 929). By his own admission, his income level dropped "[d]rastically" when he assumed the bench, while many of his expenses, such as alimony payments of $21,000 per year, remained constant (Tr. 929). He found himself, in his own words, "in a financial bind" (Tr. 930). Indeed, in mid-August 1980, he wrote a letter to an attorney requesting immediate payment of a $37,500 legal fee due him because, "[f]or the first time in my life, I am desperately in need of money" (Tr. 72, 84; GX 10).

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[1]Judge Ferguson dissented from an order denying rehearing en banc (Pet. App. A127). Judge Reinhardt and Judge Pregerson later filed dissents from the denial of rehearing en banc.

During 1979 and 1980, pursuant to fee-splitting agreements with two other attorneys in his former office, petitioner received shares of fees for work he had performed on cases before he became a judge (Tr. 18, 21; GXs 6, 7, 9). Petitioner also received legal fee income from other attorneys with whom he had worked on cases (GXs 11, 13). Petitioner received fee income of $41,072.93 during 1979 (Tr. 475-489) and $87,911.83 during 1980 (Tr. 496-501). On his income tax return for 1979, however, petitioner reported only $22,332.87 of his fee income (GX 3; Tr. 177, 471-472). He reported no fee income on his return for 1980 (GX 5; Tr. 492). Evidence at trial showed that petitioner kept a personal record book that reflected the true amounts of his legal fee income (DX 47).

a. The 1979 Tax Year. Petitioner's income tax return for 1979 was prepared by a public accountant and friend, Joseph "Jay" Wright, who had provided a variety of accounting services, including bookkeeping and tax return preparation, to petitioner since 1949 (Tr. 118-121, 162-163, 177, 826). Wright charged petitioner an annual fee of $600 for all of his services (Tr. 1167). Prior to 1979, petitioner had provided substantial financial information to Wright (Tr. 118-120, 215, 829-833), but during that year petitioner began to forward less and less information to Wright (Tr. 152-153, 303).

In early March 1980, petitioner sent Wright a handwritten note in which he asked Wright to prepare a letter to a mortgage company in connection with an application to assume a mortgage. Petitioner stated that he had received earnings from his practice of $46,371.93 in 1979 and $41,000 in January 1980 (GX 28; Tr. 155-158, 854, 935). Subsequently, Wright used the $46,371.93 figure to prepare an application for an extension of time to file petitioner's income tax return for 1979 (GX 30; Tr. 167). On April 11, 1980, petitioner signed the application and gave Wright two

checks in the amounts of $8,000 and $2,500 to cover petitioner's estimated tax balance for 1979 and estimated tax for the first quarter of 1980 (DX 4; GX 30; Tr. 162-167).

On May 22, 1980, Wright again used the $46,371.93 figure in two more letters to mortgage companies (GX 29; Tr. 161-162, 168-169). But at some point between that date and June 15, 1980, petitioner informed Wright that only $22,322.97 of the $46,371.93 represented legal fee income (GX 31; Tr. 169-177, 855, 1200). Wright then used the $22,322.97 figure to report legal fee income on petitioner's tax return (GX 3). In fact, petitioner's true legal fee income was $41,072.93. The difference, $18,740.06, which is the amount of unreported income, reflects petitioner's failure to report to Wright most of the checks for legal fees he received in 1979 (GXs 6, 9; Tr. 475-489).[2]

b. The 1980 Tax Year. Prior to filing his income tax return for 1980, petitioner decided to stop using Wright's services and to utilize those of a new firm called Creative Tax Planning, run by an individual named Jerry Watson (Tr. 884, 968-969). Watson, who was not a college graduate, had worked at various jobs, including insurance sales, encyclopedia sales, and farming, until the late 1970's when he set up a bookkeeping business (Tr. 786-790, 795). Petitioner hired Watson without any inquiry into his background or qualifications (Tr. 961-970).

Following discussions with petitioner about his 1980 tax return, Watson sent petitioner a letter dated April 6, 1981, in which Watson stated that " 'the possibility of taking a loss on your business looks good.' " The "business" to which

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[2]Petitioner claimed at trial that he had reported all of his $41,072.93 income to Wright in a letter dated April 11, 1980 (DX 1). The government's evidence showed, however, that neither Wright nor his secretary had seen this letter prior to its disclosure by defense counsel in November 1983 (Tr. 278-279, 351-352).

Watson referred was petitioner's law practice, the assets of which had previously been completely written off on petitioner's income tax return for 1978. Tr. 798-807, 921-924.[3]

On or about April 13, 1981, petitioner filled out and signed a request for extension of time to file his 1980 tax return, in which he reported an estimated tax liability of $42,847.96 (GX 4; Tr. 7). By June 15, 1981, Watson had completed preparation of petitioner's 1980 return (Tr. 807). After looking through the return and discussing it with Watson for ten or fifteen minutes, petitioner signed it (Tr. 814-815, 974-977). Because of his failure to report his fee income, petitioner received a tax refund of $44,356 (GXs 4, 38; Tr. 368-372). Petitioner paid Watson $2,000 for preparing the return, without any additional tax or bookkeeping services (Tr. 782). Watson admitted that the amount of the anticipated tax refund was "a factor" in computing his fee (Tr. 785).

ARGUMENT

The decision of the court of appeals is correct and is not in conflict with any decision of this Court or of any court of appeals. Accordingly, review is not warranted.

1. Petitioner contends (Pet. 33-43) that the Constitution required his removal from office through the impeachment process before he was subjected to a criminal prosecution. He previously raised this claim in his petition for a writ of certiorari in No. 83-1992, and he fails to point to any

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[3]Petitioner maintained that the fees he received in 1980 were included in $150,000 reported on his 1980 tax return as the price for a reported sale of his law practice. He conceded, however, that fee income could not appropriately be characterized as a capital gain. Pet. App. A41-A42. At trial, the evidence showed that petitioner had experience in tax matters, had personal knowledge of the difference between capital gain and ordinary income, and had for 30 years reported his legal fees as ordinary income (Tr. 914-928).

changed circumstances suggesting that review is now warranted. Accordingly, for the reasons set forth in our brief in opposition to the petition in No. 83-1992, petitioner's claim lacks merit, and his request for review of this issue should again be denied.

2. Petitioner also contends (Pet. 44-49) that the district court improperly denied him an opportunity to prove allegations that the prosecutors were motivated by an intent to drive him from office and punish him for the manner in which he exercised his judicial powers. He further asserts (Pet. 49-52) that, because of his allegations as to the government's motivation in prosecuting him, the court of appeals should have held the government to a higher standard than usual in assessing allegations of grand jury abuse.[4] Petitioner bases his assertions on the doctrine of separation of powers. His position lacks merit.

a. Petitioner's challenge to the government's motivation in prosecuting him is, in essence, a claim that he was the victim of selective prosecution. To prevail on a claim of selective prosecution, a defendant must meet a heavy burden of showing that the decision to prosecute him was both discriminatory in effect and motivated by an impermissible purpose. See, *e.g.*, *Wayte* v. *United States*, No. 83-1292 (Mar. 19, 1985), slip op. 9; *United States* v. *Jennings*, 724 F. 2d 436, 445 (5th Cir.), cert. denied, 467 U.S. 1227 (1984); *United States* v. *Hazel*, 696 F.2d 473, 474 (6th Cir. 1983); *United States* v. *Saade*, 652 F.2d 1126, 1135 (1st Cir. 1981); *United States* v. *Ness*, 652 F.2d 890, 892 (9th Cir.), cert. denied, 454 U.S. 1126 (1981); *United States* v.

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[4]Petitioner's statement of the question presented (Pet. i-ii) implies that petitioner was denied a hearing as to his allegations of grand jury abuse as well as his complaint regarding the government's motivation in prosecuting him. He concedes (Pet. 50), however, that the district court did hold evidentiary hearings on allegations of grand jury abuse.

Myers, 635 F.2d 932, 940 (2d Cir.), cert. denied, 449 U.S. 956 (1980); *United States* v. *Diggs*, 613 F.2d 988, 1003 (D.C. Cir. 1979), cert. denied, 446 U.S. 982 (1980). Furthermore, to merit an evidentiary hearing on the issue, a defendant must allege facts sufficient to show the discriminatory effect and raise a reasonable doubt as to the prosecutor's purpose. See, *e.g.*, *United States* v. *Jennings*, 724 F.2d at 445; *United States* v. *Hazel*, 696 F.2d at 475; *United States* v. *Saade*, 652 F.2d at 1135. Petitioner has made no showing of any kind that others who have committed the offenses for which he was indicted have not been prosecuted. And he has presented little, if anything, beyond bare allegations in support of his claim that the government was motivated in the instant case by a desire to drive him from office in retaliation for his judicial decisions (see Pet. App. A153, A168-A170). Petitioner's allegations fall far short of what is necessary to establish a claim of selective prosecution. See *United States* v. *Myers*, 635 F.2d at 940 (conclusory allegation that defendant was "disfavored" legislator insufficient); *United States* v. *Diggs*, 613 F.2d at 1004 n.92 (defendant's "broad assertion" that, as a member of Congress, he frequently came into conflict with the administration insufficient).

Petitioner asserts (Pet. 45) that the separation of powers doctrine requires special protections for the judiciary to prevent the Executive Branch from using its prosecutorial power as a means of coercing judges and chilling judicial independence.[5] But neither the text of the Constitution nor

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[5]Petitioner does not spell out in his petition what special protections he seeks. But implicit in his argument and his statement of the question presented is a contention that an improper motive on the part of the prosecutor should, by itself, require dismissal of an indictment, even if similarly situated persons have been prosecuted, and that bare allegations of an improper motive should be enough to require a hearing. As we discuss in the text, special protections against abuse of prosecutorial discretion are not needed. Moreover, public respect for the law clearly

any other authority supports according judges such special protections, and such protections are unnecessary, given the existing safeguards against improperly motivated prosecutions against judges. In *United States* v. *Brewster*, 408 U.S. 501, 522-525 & n.16 (1972), this Court identified factors that minimized the possibility that prosecutors would bring cases against members of Congress as a means of interfering with the members' independence. These factors are equally applicable with respect to judges. For example, judges are protected by the procedural barriers facing a prosecutor attempting to bring a case—the requirements of persuading a grand jury to return an indictment and of convincing a petit jury beyond a reasonable doubt, with the presumption of innocence favoring the accused (*id.* at 522-523 n.16). Moreover, prosecutors are faced with the courts' substantial control over judicial proceedings and therefore can ill afford to jeopardize their credibility and professional standing by engaging in unjust harassment of judges (see *ibid.*). Also important are "the omnipresence of the news media whose traditional function and competitive inclination afford no immunities to reckless or irresponsible official misconduct" (*ibid.*) and "the public reaction engendered by any attempt of one branch to dominate or harass another" (*id.* at 523). These barriers to retaliatory prosecutions of judges are sufficient to secure the Judicial Branch against improperly motivated prosecutions.[5]

b. Petitioner implies (Pet. 51) that the court of appeals found that the prosecutors had engaged in grand jury abuse. He asserts (*id.* at 49-52) that, in finding that the alleged abuse did not warrant dismissal of the indictment, the court of appeals erred by treating petitioner's claims of abuse as if

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would suffer if judges, who hold positions of public trust and should be held to a high standard of behavior, are given special privileges to escape prosecution that are unavailable to ordinary citizens.

they had been made by an ordinary criminal defendant. Petitioner asks this Court to resolve the question "whether separation-of-powers principles required that the Executive be held to a higher standard when a federal judge alleged that the abuses were motivated by a bad-faith intent to attack him as a judge for the manner in which he exercised the judicial power" (*id.* at 51-52).

The court of appeals did not in fact find grand jury abuse. Relying on this Court's opinion in *United States* v. *Thompson*, 251 U.S. 407, 413-414 (1920), which held that adverse action or failure to act by one grand jury does not limit or exhaust a successor grand jury's power to investigate, and Fed. R. Crim. P. 6(e)(3)(C)(iii), which authorizes transfer of one grand jury's material to another grand jury without a court order, the court of appeals held that the government's presentation of evidence to three grand juries was not improper (Pet. App. A28-A29). The court also rejected petitioner's contention that the prosecution had knowingly presented perjured testimony of Joseph Conforte to the grand jury (*id.* at A19-A21). The court pointed out that petitioner had made no showing, beyond mere speculation, that Conforte had given perjured testimony, and no "showing that the Government had any reason to believe that Conforte's testimony was perjured" (*id.* at A19 (footnote omitted)).[6] Finally, the court rejected petitioner's claim that IRS and FBI agents were improperly used as " 'grand jury agents' " (*id.* at A31-A40). The court held that

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[6]Moreover, as the court of appeals also held (Pet. App. A21-A23), even if Conforte perjured himself, his grand jury testimony was not material or prejudicial to petitioner. The testimony did not relate to the tax counts or the ethics count, there was sufficient non-perjured evidence to justify indictment of petitioner on those counts, and Conforte did not testify at petitioner's second trial. Thus, Conforte's grand jury testimony could not warrant dismissal of the indictment. See *United States* v. *Morrison*, 449 U.S. 361 (1981). See also *United States* v. *Mechanik*, No. 84-1640 (Feb. 25, 1986).

the disclosure of grand jury material to the agents was authorized (*id.* at A37-A39), that there was no unauthorized presence of the agents during grand jury proceedings (*id.* at A39), and that the employment of the agents did not override the independence of the grand jury. Petitioner points to nothing suggesting that these determinations of the court of appeals were incorrect or are in conflict with a decision of any other court of appeals. In any event, none of these claims of grand jury irregularity survives petitioner's conviction by the petit jury at a valid trial. *United States* v. *Mechanik*, No. 84-1640 (Feb. 25, 1986).[7]

3. Finally, petitioner contends (Pet. 55-63) that he was prejudiced because the district court withheld from him FBI and IRS summaries of interviews with petitioner's tax return preparer, Joseph Wright. He suggests the summaries were statements by Wright subject to disclosure under the Jencks Act, 18 U.S.C. 3500, and that they contained material exculpatory information to which petitioner was entitled under this Court's decision in *Brady* v. *Maryland*, 373 U.S. 83 (1963) and its progeny. The court of appeals properly rejected these claims (Pet. App. A61-A78).

Petitioner bases his claim of prejudice on a statement in the interview summaries that suggests that Wright may have misplaced, destroyed, or thrown away some of petitioner's pre-1976 tax records when Wright moved to a new

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[7]Petitioner also posits (Pet. 52-54) that the disruption of judicial business resulting from the prosecution of a judge is a factor this Court should consider in deciding whether to review this case. However, it is petitioner's criminal conduct, which the jury found proven beyond a reasonable doubt, rather than the prosecution of petitioner, that is responsible for any disruption of judicial business here. Petitioner also questions (Pet. 53) the impartiality of the judicial process in cases involving judges. But at bottom, he simply suggests that judges are entitled to special treatment. Plainly, a judicial system does not lack impartiality because it fails to accord special rights and privileges to judges accused of committing criminal offenses.

office (Pet. App. A62-A63). At trial, petitioner testified that he had sent Wright a letter accurately disclosing his 1979 income from legal fees (*id.* at A45-A46, A62-A63, A70-A71). Wright testified that he had not received such a letter and that he had not lost or misplaced any records pertaining to petitioner (*id.* at A63). Petitioner contends that the information contained in the interview summaries could impeach Wright's testimony on the question whether Wright destroyed or misplaced records (Pet. 60).

The court of appeals correctly determined that the interview summaries were not statements qualifying for disclosure under the Jencks Act (Pet. App. A64-A68).[8] It also concluded (Pet. App. A68-A70) that any error in the district court's refusal to disclose the summaries pursuant to the Jencks Act was not prejudicial. As the court observed, petitioner cross-examined Wright, at petitioner's first trial, concerning Wright's loss of records resulting from his move to a new office. Thus, petitioner plainly knew of the loss and made use of his knowledge without access to the summaries. Moreover, the records destroyed pertained to pre-1976 work, which would have had no bearing on the crimes charged. Under these circumstances, the court correctly determined that any error was harmless. See *Rosenberg* v. *United States*, 360 U.S. 367, 371 (1959). This factbound determination does not warrant further review.

Petitioner's *Brady* claim must fail for similar reasons. Under *Brady*, the government must disclose evidence that is both favorable to a defendant and material to guilt or punishment. 373 U.S. at 87. Impeachment evidence, as well as exculpatory evidence, falls within the *Brady* rule. See *United States* v. *Bagley*, No. 84-48 (July 2, 1985). In

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[8]The interview summaries were not statements made or adopted by the witness, a verbatim transcription of an oral statement, or grand jury testimony. See 18 U.S.C. 3500(e).

Bagley, this Court held that a conviction must be reversed on *Brady* grounds "only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial" (slip op. 10). Here, there is no reason to believe that telling petitioner what he already knew could have changed the result of his trial.[9]

Thus, the court of appeals correctly rejected petitioner's claims under the Jencks Act and the *Brady* rule.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9]Petitioner asserts (Pet. 55-61) that this Court should clarify the *Bagley* standard by applying it to the specific facts of this case but points to nothing suggesting either a need for clarification or any basis for doubting the correctness of the decision in this case. Indeed, given the "inherently factbound nature of the cases to which it will be applied" (*Bagley*, slip op. 1 (White, J., concurring)), there is little to be gained from application of the standard by this Court to this particular set of facts.

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